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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 802

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION AND LACLEDE GAS LIGHT COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 206–219), affirming the order of the United States District Court for the Eastern District of Missouri, is reported at 151 F. 2d 424. The opinion of the District Court (R. 98–135), approving and enforcing a plan previously approved by the Securities and Exchange Commission under Section 11 (e) of the Public Utility Holding Company Act of 1935, is reported at 57 F. Supp. 997. The

findings and opinion of the Commission (R. 8–58), dated May 24, 1944, have not yet been officially reported but are set forth in the Commission's Holding Company Act Release No. 5062.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on October 30, 1945 (R. 220). A petition for rehearing was denied November 28, 1945 (R. 265). The petition for a writ of certiorari was filed on February 4, 1946. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. § 347), made applicable by Section 25 of the Public Utility Holding Company Act of 1935.

STATUTE INVOLVED

The applicable provisions of the Act are set forth in the Appendix, *infra*, pp. 30–41. The substance of the relevant statutory provisions is as follows:

Under Section 11 (b) (1) of the Act, it is the duty of the Commission to require all registered holding companies and their subsidiaries to "take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system * * *"

And under Section 11 (b) (2) of the Act, it is the duty of the Commission to require all regis-

tered holding companies and their subsidiaries to "take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system." The last sentence of Section 11 (b) (2) provides that "Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company."

To enable the Commission to compel compliance with its orders issued under Section 11 (b), the Commission is authorized by Section 11 (d) of the Act to resort to the district courts of the United States for enforcement of such orders, which may include reorganization.

Section 11 (e) permits a company, in anticipation of the compulsions of Section 11 (b) and (d), to "submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling" the company to comply with Section 11 (b). The Commission, after notice and op-

portunity for hearing, is authorized to consider whether the plan is "necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan," and, if the Commission so finds, to make an order approving the plan. Thereafter, the Commission is empowered, at the request of the company, to apply to a district court "to enforce and carry out the terms and provisions of such plan." The court is authorized to enforce the plan if, after notice and opportunity for hearing, it "shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11."

Section 26, upon which petitioner relies, is set forth in the Appendix, *infra*, pp. 40–41.

QUESTIONS PRESENTED

1. In connection with a debt retirement to comply with Section 11 (b) of the Holding Company Act, was it consistent with the "fair and equitable" standard of Section 11 (e) to pay face amount and interest to the effective date of the plan notwithstanding the existence of an indenture provision giving the company an option to retire the bonds at a premium?

2. Did the Commission and the courts below properly conclude under the circumstances of this case that compliance with Section 11 (b) required respondent Laclede Gas Company to retire its outstanding debt, including bonds held by petitioner?

Other questions stated by petitioner are either subsidiary to these basic questions or, in our opinion, are not really involved.

STATEMENT

The petitioners seek review by this Court of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit which affirmed an order of the United States District Court for the Eastern District of Missouri approving and enforcing a plan previously approved by the Securities and Exchange Commission under Section 11 (e) of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79 (a) et seq.

The plan was proposed by Ogden Corporation, a registered holding company, and by certain of its subsidiaries including The Laclede Gas Light Company and Laclede Power & Light Company.[1] The plan, which has been fully executed, provided generally that Ogden was to divest itself of its interests in the two named subsidiaries, and that Laclede Gas was to be reorganized for the purpose of ending an unfair and inequitable distribution of voting power among its security holders.

In connection with the reorganization of Laclede Gas the plan provided for retirement of its out-

[1] The Public Utility Holding Company Act of 1935 is herein referred to as the "Act"; Ogden Corporation, as "Ogden"; The Laclede Gas Light Company, as "Laclede Gas"; and Laclede Power & Light Company, as "Laclede Electric."

standing bonds, including a second-mortgage issue known as the "1919 bonds" not then due, and for payment of face amount and interest to the effective date of the plan in full discharge of the company's obligation. Petitioner as a holder of bonds of this issue objected, claiming the right to a premium under an indenture provision permitting the issuer at its election to retire the bonds prior to maturity upon the payment of a stipulated premium. The Commission and the courts below rejected petitioner's contention concluding (1) that the retirement of the bonds under the plan did not constitute an exercise by the company of the privilege of retirement under the indenture provision relied upon by petitioners, and (2) that the standard of fairness and equity was fully satisfied by payment of face amount and interest under the circumstances. The prepayment was found necessary to comply with the Act and it was also found that the investment contract thus prematurely terminated by the operation of the Act did not have a value in excess of the face amount.

The plan has been fully consummated and the bonds discharged, except that a sum of money sufficient to pay the disputed premium has been held in escrow. The sole issue presented to the court below and involved in the instant petition is the right to the premium. However, in view of the nature of petitioner's arguments, including its challenge to the necessity and appropriateness

of the plan, it is necessary to describe the nature of the plan and the broader issues presented in the administrative proceeding.

Utilities Power and Light Corporation, predecessor of Ogden, was a public utility holding company, registered as such under Section 5 of the Act. It was in reorganization under Section 77B of the Bankruptcy Act, and its reorganization plan as confirmed by the court provided that the reorganized company, Ogden, would dispose of its public utility interests in order to meet the requirements of Section 11 (b) of the Act. (R. 14.) The reorganization plan of Utilities Power & Light also provided that the reorganized company would file a plan with the Commission designed to bring its utility system into conformity with Section 11 (b) of the Holding Company Act.

The reorganized company, Ogden, had two subsidiaries in St. Louis: Laclede Gas and Laclede Electric. Laclede Gas operates a mixed manufactured and natural gas business in the City of St. Louis. It also owned some electric utility assets which it leased to Laclede Electric. Ogden owned 23% of Laclede Gas's preferred stock and 85% of its common stock, giving it 74% of Laclede Gas's outstanding voting securities. Laclede Gas had outstanding a total of $34,000,000 of indebtedness, an amount in excess of the original cost of its properties, after adjustments to reflect adequate depreciation. Interest coverage was re-

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latively slight and earnings were less than interest charges in the years 1935, 1936, 1938, and 1939. Laclede Gas also had outstanding $2,333,000 par value of preferred stock, dividends on which had been in arrears for many years. (R. 12–17.) The 1919 bonds held by petitioner were second mortgage bonds outstanding in the amount of $23,000,000 and junior to a $9,000,000 issue of first mortgage bonds maturing on April 1, 1945. Because of obstacles to refunding the maturing first mortgage bonds and lack of funds to discharge them,[2] Laclede Gas might have been confronted with the necessity of reorganization under Chapter X of the Bankruptcy Act if it had not proved possible to work out a reorganization under the Holding Company Act (R. 41, 45–46, 215).

Laclede Electric was virtually a wholly-owned subsidiary of Ogden. It operated an electric utility system in St. Louis, in part with facilities leased from Laclede Gas. There was an unresolved controversy as to which electric properties were owned by Laclede Gas and which by Laclede Electric and as to whether the lien of the 1919 bonds of Laclede Gas extended to the properties owned by Laclede Electric, as well as to the concededly covered properties owned in fee by Laclede Gas and leased by it to Laclede Electric (R. 13). While Laclede Electric, unlike La-

[2] For a description of the precarious financial condition of Laclede Gas, see R. 15–20.

clede Gas, was not in imminent financial difficulty, nevertheless because of the unresolved controversy as to the scope of the lien, it would have been extremely difficult for Laclede Electric to raise any new capital from the public, an obvious necessity if it was to be in a position to hold its own competitively or even to meet the minimum demands for service on the part of the public (R. 55). The entire electric utility system operated by Laclede Electric competed in the City of St. Louis with the much larger Union Electric Company of Missouri. There were indications in the record of the wastefulness of this competition (R. 55).

Prior to the filing of the instant plan the Commission had entered an order in a consolidated proceeding under Sections 11 (e) and 11 (b) providing, in pertinent part, as follows: (a) Laclede Gas was directed, pursuant to Section 11 (b) (2), to "* * * take such steps as may be necessary to recapitalize so as to distribute voting power fairly and equitably" among its security holders; (b) Ogden was directed, pursuant to Section 11 (b), to "* * * take such action as may be necessary to divest itself of all of its interest * * * in * * * public utility companies" (including Laclede Gas and Laclede Electric) provided that in the case of Laclede Gas such divestment should not be effected by means of disposition of securities prior to its recapitalization "* * * to the extent necessary

to comply with Section 11 (b) (2)"; (c) the Commission expressed approval under Section 11 (e) of an over-all plan filed by Ogden and its subsidiaries which provided, among other matters, that Laclede Gas was to be recapitalized, as stated in the order, "* * * in such manner as to comply with the provisions of Section 11 (b) (2) of the Act; the recapitalization * * * to include a substantial reduction of its debt * * *."

In its findings and opinion accompanying that order, the Commission specifically found that bringing about an equitable distribution of voting power in Laclede Gas required a substantial reduction in its debt.[3] No petition was filed to review that order, and it is no longer subject to review.[4]

The instant plan was submitted for the stated purpose of complying with Section 11 (b) and the order of May 20, 1943. In its final form the plan provided in substance as follows (R. 21–23):

(1) The electric properties operated by Laclede Electric, including properties leased from

[3] The Commission stated: "In [the] reorganization [of Laclede Gas] it appears necessary that debt be reduced substantially, preferred stock arrears eliminated, and the property accounts adjusted to modern accounting and regulatory standards." (Holding Company Act Release No. 4307, p. 25.)

[4] Under the last sentence of Section 11 (b), all orders of the Commission under that subsection are subject to review in a circuit court of appeals under Section 24 (a) (*infra*, pp. 38–40). The sixty-day period within which such review might be sought has long since expired.

Laclede Gas, were to be sold to Union Electric Company of Missouri, a nonaffiliated company, at a base price of $8,600,000, and $2,200,000 of this amount was to be allocated to Laclede Gas as its share of the proceeds.

(2) Laclede Electric was to be dissolved.[5]

(3) Laclede Gas was to be recapitalized as follows: All of its publicly held bonds were to be retired at the principal amount thereof, together with accrued interest to the effective date of the plan. Laclede Gas was to sell at competitive bidding $19,000,000 of bonds under a new mortgage indenture, and $3,000,000 of serial debentures.[6] New common stock was to be issued to the preferred and common stockholders of Laclede Gas in certain stated proportions. In addition to 149,261 shares of new common stock to be allotted to it as a stockholder, Ogden was to receive 2,000,000 shares in return for (a) cancellation of $2,000,000 in notes held by it; (b) payment to Laclede Gas of $905,000 in cash; and (c) payment to Laclede Gas of Laclede Electric's share of the cash proceeds from the sale of the electric properties, this being approximately $6,175,000. (R. 104–105.)

[5] This dissolution required appropriate provision for minority stockholders.

[6] The new bonds have been sold at an interest rate of approximately 3½%, as compared with 5% on the 1904 bonds and 5½% on the 1919 bonds. The new debentures have been sold at an interest rate of 3⅛%.

(4) All of the new common stock of Laclede Gas acquired by Ogden was to be sold to the public.[7]

The net result of the plan was therefore full compliance with Section 11 (b): Ogden was to divest itself of its St. Louis utility properties, and Laclede Gas, with a $12,000,000 debt reduction and a correspondingly greater equity cushion, would have a more fair and equitable distribution of voting power among its security holders.

The Commission's holding that the plan was necessary and that it was necessary to retire the Laclede Gas 1919 bonds rested upon subsidiary findings as to (1) the necessity to reorganize Laclede Gas in order to correct inequitable distribution of voting power among its security holders, and (2) the necessity to simplify the complex nature of Ogden's interest in the St. Louis area in order to facilitate disposition thereof for the purpose of enabling Ogden to comply with Section 11 (b) (R. 43–45). The same

[7] Upon such sale Ogden received $4.44 per share of new Laclede Gas stock. The total amount received was $9,463,000. Inasmuch as Ogden contributed to the Laclede Gas reorganization $7,080,000 of cash (including the $6,175,000 received in connection with the sale of the electric properties), the balance of $2,383,000 represents what Ogden received for its entire interest in Laclede Gas consisting of $2,000,000 in notes and its stock holdings stated above (p. 7). We discuss below, at p. 20, n. 13, petitioner's intimation that Ogden should not have been regarded as entitled to the cash which it received from the sale of the electric properties.

factual findings are the basis for the Commission's conclusion that the company's submission of the plan for purposes of complying with the Act and with the prior order of the Commission did not constitute an election on its part to invoke the contractual provision for retirement of the bonds at a premium.

With respect to the fairness of payment of face amount and interest to the holders of 1919 bonds, the Commission found this to be adequate compensation for their claims "in view of the relatively small margins by which the claims are covered, and the substantial risks involved." The Commission noted, among other things, the imminent threat of bankruptcy absent the plan, the low financial rating and poor market record of the bonds, their marginal earnings and asset coverage, and the fact that they were originally offered at a substantial discount (R. 45–46). The District Court adhered to the Commission's conclusion after a detailed and considered analysis of the problems presented (R. 98–135).[8]

In affirming the order of the District Court the Circuit Court of Appeals noted the absence of any challenge to the findings of fact made by the Commission and approved by the District Court (R. 211), and its agreement with the inferences of the Commission and the District Court as to

[8] We believe that petitioner's suggestions of blind reliance upon the Commission (Pet. 67–74) are unwarranted.

the non-exercise by the company of the call provision in the indenture and the necessity for retirement of the 1919 bonds to comply with the statute.

ARGUMENT

While the principal problem presented by the petition is a recurrent one in the administration of the Act, the decision of the court below is clearly correct, is in conformity with the decisions of three other circuits, and does not call for further review by this Court. Petitioner's attempt to distinguish the earlier holdings rests upon inferences of fact rejected by the Commission and both of the lower courts, and its contention as to conflict with decisions of this Court rests, we submit, upon misapprehension of the problems presented.

1. The Commission and such courts as have considered the problem have uniformly held that indenture provisions for payment of a premium upon redemption at the election of the issuer are inapplicable where, as here, the retirement of the indebtedness occurs because of the compulsion of Section 11, whether to meet a Section 11 (b) order or in anticipation thereof. See R. 42, at n. 32. Cases in other circuits are: *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. 2d 274 (C. C. A. 2, 1942), certiorari denied, 318 U. S. 786, rehearing denied, 319 U. S. 781; *In re Standard Gas and Electric Company*, 151 F. 2d 326

(C. C. A. 3, 1945), petition for certiorari pending, Nos. 831, 832, 833, this Term;[9] *City National Bank and Trust Co.* v. *Securities and Exchange Commission,* 134 F. 2d 65 (C. C. A. 7, 1943). See also district court decisions cited in the *Standard Gas* case, 151 F. 2d 326, 332. The rationale of these decisions involves the following propositions:

(1) The common call provision in an indenture, such as that involved in the instant case, gives the corporation a privilege of prepayment on payment of a premium if it so elects and in itself adds nothing to the contractual rights otherwise conferred on the bondholders.

(2) Assuming that retirement of the debt before maturity is necessary to comply with the provisions of Section 11, a so-called voluntary plan filed under section 11 (e), including a provision for prepayment at face amount, does not involve an election by the company to exercise the call privilege.

(3) Assuming the call provision to be inapplicable, the situation is as if there were no provision for prepayment and the contract for continued use of funds by the company and payment of interest therefor were frustrated by operation of law.

[9] In the *Standard Gas* case the Third Circuit Court of Appeals cited the opinion of the district court in this case to support its holding on this point, expressing the view that that decision and the others cited are "right."

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(4) Prepayment of the bonds at face amount (with interest to the date of payment) is fair and equitable under circumstances which constitute it the substantial equivalent of the contract for payment of principal and interest to maturity.

In the *New York Trust Company* case, which was the first administrative as well as the first judicial precedent, there was no express reliance on the poor investment quality of the bonds to be retired as a circumstance affecting the conclusion that face amount and interest should be the measure of payment once it was determined that the premium provision was inapplicable.[10] In subsequent cases which have upheld premature payment of bonds at their face amount without premium under Section 11 (e) plans, both the Commission and the courts have relied, at least in part, upon the poor investment quality of the bonds involved and upon the absence of any showing that the application of this measure would result in an unfair windfall to stockholders by permitting them to escape through operation of the statute from a disadvantageous contract on payment of less than its investment value. The *American Power and Light Company* case, emphasized by petitioner, discusses the development of the doctrine. See Holding Company Act Re-

[10] The Commission's brief before the Court of Appeals did place some emphasis upon the low investment quality of the bonds involved in that case.

lease No. 6176 at pp. 11–14. In that case the Commission was confronted for the first time with a situation in which the bonds to be retired under the compulsion of Section 11 were found to have such high investment quality in relation to their interest rate as to make it appear that retirement at face amount would result in loss to bondholders and a windfall to stockholders. Under those circumstances the Commission concluded (one Commissioner dissenting) that the "fair and equitable" standard required a payment in excess of face amount. Even in that case, however, the call premium was treated as relevant only as fixing a maximum to the compensation otherwise payable to the bondholders.[11] But the problem which divided the Commission in the *American Power and Light Company* case is not presented by the facts of the instant case. On the contrary, it was the unanimous finding of the Commission and the courts below that the payment of face amount and interest was full compensation to the 1919 bondholders for the termination of the investment contract involved.

These same factual findings are a complete answer to petitioner's argument that the approval of the instant plan violates the principles laid

[11] One of the American Power & Light Co. issues to be retired was not presently callable and received a larger payment than the call price made applicable as a ceiling to the callable issue. See Holding Company Act Releases Nos. 6201, 6258.

down in *Case* v. *Los Angeles Lumber Products Company,* 308 U. S. 106, and other decisions of this Court. The established principle that bondholders must be compensated for accepting an inferior security surely does not mean that bondholders paid in cash must receive something more than the fair value of the rights surrendered. As the court below held (R. 215), the Commission in the instant case applied the rule of strict priorities, as stated by this Court in *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.,* 318 U. S. 523 (cited in *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624, 639–640, as applicable to Section 11 (e)) under which "fair and equitable" treatment requires that a security holder should receive "in the order of his priority * * * from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered." [12]

[12] Petitioner claims that the principle of the *Los Angeles Lumber Products Company* case was violated when the Commission referred to the possible bankruptcy of Laclede Gas absent the plan. But the ruling of this Court in that case was only that an unfair plan which violated the principles of strict priority could not be justified by the consideration that creditors affected might have fared worse in bankruptcy. Here the reference to possible bankruptcy (including a Chapter X proceeding in which application of the bankruptcy standard of fairness and equity scarcely would preclude paying face amount and interest to the holders of the 1919 bonds) was only to refute the hypothesis that petitioners were being deprived of a contract right which, apart from the operation of Section 11, might have been assumed to have a value in excess of face amount.

2. Petitioner (Pet. 22, 34) makes the impractical contention that the Commission and the District Court could not approve a plan for discharge of bonds at their face amount without resolving the long pending dispute as to whether the lien of the 1919 bondholders extended to the electric property owned by Laclede Electric, in addition to the concededly covered properties owned by Laclede Gas and leased by it to Laclede Electric. Under Section 11 (b) the Commission has a duty to bring about compliance "as soon as practicable." It is apparent that final resolution of this controversy would have involved delays and expense disproportionate to its bearing, if any, upon the rights of the 1919 bondholders to anything more than payment of the face amount of their claims. Indeed it is unlikely that an attempt to resolve this controversy as a preliminary to the plan could have had any consequence other than delay and an increase of the risk of bankruptcy which it was among the purposes of the plan to avoid. The earnings figures relied upon by the Commission reflected rentals paid by Laclede Electric under a lease which did not expire until 1953, and it was after giving effect to these rentals that the Commission found interest requirements of Laclede Gas covered by a relatively slender margin. In fact, in the years 1935, 1936, 1938, and 1939 its earnings, including such rentals, were less than its interest charges (R. 26). Resolution favorable to the 1919 bondholders of the contro-

versy as to the scope of the lien would at most have had some bearing on the prospective earnings after 1953—on the hypothesis that a more favorable rental could then be obtained.[13]

3. The holding of the court below that the plan is not in contravention of Section 26 (c) of the Act is in accordance with the result necessarily reached in all of the other cases which have denied payment of a premium. The Commission construes Section 26 (c) as merely a qualification of the conditions under which contracts in violation of the Act would be invalidated under the preceding subsections (a) and (b) of 26, or under common law principles applicable to illegal contracts. See *Community Gas and Power Company,* Holding Company Act Release No. 4395 (1943), pp. 19 to 21.[14] But on no possible interpretation of 26 (c),

[13] Petitioner urges that the computations of the Commission and the courts below regarding the fairness of the plan to Ogden erroneously gave it credit for the contribution of $6,175,000 cash to the Laclede Gas reorganization which Ogden received for its interest in Laclede Electric. Petitioner suggests that Ogden was not entitled to this cash because of the disputed lien claim of the 1919 bonds upon electric properties operated by Laclede Electric other than those leased from Laclede Gas. But there was no dispute as to the ownership of the equity in these assets; and even if bankruptcy of Laclede Gas had been precipitated as a result of the failure to put through a plan under the Holding Company Act, Ogden and Laclede Electric would have been free to realize upon this equity upon making provision for paying off the 1919 bonds at their face amount.

[14] The fact that Section 26 in its entirety was taken from Section 29 of the Securities Exchange Act of 1934, 48 Stat. 881, 903, emphasizes its relation to the general problem of the

could it be held to require the payment of a premium in the face of a determination that the contractual provision therefor is inapplicable. See *City National Bank and Trust Company* v. *Securities and Exchange Commission, supra,* 134 F. 2d 65, at 67.

4. We do not understand petitioner to raise any serious question as to the warrant in the record for the finding of the Commission and the lower courts as to the necessity to retire the 1919 bonds in order to resolve the problems confronting the Laclede companies and Ogden under Section 11. These problems included reduction of the debt of Laclede Gas so that its structure would no longer cause an inequitable distribution of voting power, as well as divestment by Ogden of its entire interest in both Laclede Gas and Laclede Electric. We believe it is sufficient that the plan resolves these problems in a direct and practical way. Application of the "necessary" standard in Section 11 (e) does not require a finding that the particular plan presented is the only possible method of compliance with the statute. To hold otherwise would require the rejection of all plans wherever more than one method of compliance might appear possible. In this case, however, no practical alternative has been suggested by petitioner or by anyone else.

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consequences of illegality and the absence of any intention that Section 26 should be construed to negative the reorganization powers elsewhere conferred in the Holding Company Act.

Since no substantial question is presented as to the necessity for retiring the 1919 bonds, it is immaterial that the resources of the companies concerned may have been sufficient to include payment of a premium if found fair and equitable. Petitioner purports (Pet. 54) to see sweeping implications in the statement of the court below that the Commission need only find the plan as a whole, rather than all of its details, to be "necessary." In its context, however, the holding is only that once prepayment of the 1919 bonds has been found "necessary," the amount to be paid to the bondholders must then be determined by "fair and equitable" standard under a proper construction of the contract obligations involved. We have seen that fairness and equity do not require payment of a premium.[15]

It would seem equally obvious that an established necessity for reduction in outstanding debt will support the necessity for a plan to accomplish this end by any one of a number of alternative methods—in this case by payment in cash, in others by exchange for new securities.

[15] One difficulty with petitioner's theory is that it might require payment of a premium to holders of callable bonds, although face amount might be sufficient if the bonds were noncallable. But the call provision is a privilege reserved to the company at its election and it has always been assumed that noncallable bonds are more desirable from the point of view of the bondholders than bonds which are subject to call at the option of the issuer.

5. We are not clear just what theory is implicit in petitioner's criticism of the holding of the court below (Pet. 58–62) that a plan to resolve inequitable distribution of voting power among the security holders of Laclede Gas could include a provision for payment in cash to some of the security holders affected by the plan.

(a) The last sentence of Section 11 (b) (2) provides:

> Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

In re Jacksonville Gas Co., 46 F. Supp. 852 (S. D. Fla.),[16] relied on by petitioner, and a number of other Commission and court decisions have uniformly construed this language as permitting any "change in the corporate structure or existence of any operating company found necessary for the purpose of fairly and equitably distributing voting power." Petitioner apparently does not challenge these decisions but argues that because the

[16] To the same effect see *In re United Gas Corp.*, 58 F. Supp. 501 (D. Del.); *In re Puget Sound Power & Light Co.* (E. D. Mass., unreported) and *Okin* v. *Securities and Exchange Commission*, 145 F. 2d 913, 914 (C. C. A. 2).

reorganization plan approved in the *Jacksonville* case distributed new securities to existing bondholders in satisfaction of their bonds, such a plan is the only type which may be approved in the case of an operating company. We think it clear that the sentence in question was intended only as a limitation upon the purposes which may occasion a reorganization rather than as an attempt to impose a rigid mold upon the form which a required reorganization may take.

(b) Nor is there any basis apart from the last sentence of Section 11 (b) (2) for a requirement that in a reorganization under that section bondholders must be given securities and may not have their claims satisfied in cash. Indeed, in the *Standard Gas and Electric Company* case (Nos. 831, 832, 833, this Term) a pending petition for certiorari is grounded on the diametrically opposite contention that creditors in a Section 11 (b) (2) reorganization may have their claims satisfied in cash but never in securities. The Commission does not employ such monist views, but believes the statute permits a form of plan which is best adapted to a solution of the problems presented in each situation. A plan which eliminates a class of security holders whose retention would give them inappropriate voting power is not infrequently necessary.

6. Contrary to petitioner's contention (Pet. 67–74), the opinions of the courts below indicate a

careful consideration of all legal questions raised by petitioner and a proper understanding of the respective functions of agency and court in passing on reorganization problems. In view of this consideration, and since there were no disputed issues of fact (R. 127, 211), petitioner makes no showing of how a different conception of the scope of judicial review could have changed the results.

In any event, the District Court did not err in concluding that the substantial evidence rule was applicable to its review of the Commission's findings incident to the court's determination of whether to approve the plan as fair and equitable. A plan under Section 11 (e) which does not contemplate district court enforcement is subject to review under Section 24 (a) (*infra*, pp. 38–40) upon petition filed in a circuit court of appeals by party aggrieved.[17] Section 24 (a) expressly incorporates the substantial evidence rule and the requirement that absent reasonable grounds for failure to raise an objection before the Commis-

[17] This was the review provisions applicable to the Commission's approval of Section 11 (e) plans in such cases as *New York Trust Company* v. *Securities and Exchange Commission*, 131 F. 2d 274 (C. C. A. 2, 1942), certiorari denied, 318 U. S. 786, rehearing denied, 319 U. S. 781, and in *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80. *Otis & Company* v. *Securities and Exchange Commission*, 323 U. S. 624, involved proceedings on appeal from district court approval, in an enforcement proceeding, of a plan theretofore approved by the Commission.

sion it shall not be considered before a court. Where a plan is the subject of court enforcement under Section 11 (e) the statute does not articulate the scope of the judicial review involved, but provides merely that court enforcement depends upon whether "the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11." It should be noted, however, that whereas the Commission must find the plan "necessary," the court need approve it only as "appropriate."

Analogies to the respective functions of Interstate Commerce Commission and court under Section 77 of the Bankruptcy Act indicate that what is involved is the normal process of judicial review in which administrative findings will be accepted by the courts if supported by substantial evidence, and in which questions of policy in the application of public interest standards are peculiarly for the agency. *Reconstruction Finance Corp.* v. *Bankers Trust Company,* 318 U. S. 163, 170; *Ecker* v. *Western Pacific R. R. Corp.,* 318 U. S. 448, 468, 473, 474.

We submit that petitioner has had the benefit of the judicial review to which it is entitled; for a fair reading of the opinions below indicates no departure from settled principles of administrative law as set forth in the decisions of this Court.

7. The references in the opinions below to the order of the Commission dated May 20, 1943 are not, as petitioner contends (Pet. 74–79), in con-

flict with decisions of other circuits. The Commission's order of May 20, 1943, was in the respects here pertinent an order pursuant to Section 11 (b) of the Act prescribing action which the Commission required of Ogden and the Laclede companies. That order was treated as conclusive only in establishing that Ogden was required to divest itself of its interest in the Laclede companies and that Laclede Gas was required to reorganize so as to reduce its debt substantially. Neither of these conclusions was or could be seriously contested by petitioner. In treating the order as the point of departure in measuring the companies' obligation to comply with the statute, the Court merely recognized the fact that the order was unquestionably final as to those companies, and made it clear that in submitting a plan of compliance with the order they were proceeding under the compulsions of the statute and not exercising a voluntary call privilege.[18]

[18] The order under Section 11 (b) was in a consolidated proceeding, and another clause of the same order expressed approval of a plan of compliance by Ogden which may have been regarded as in the nature of a program rather than a definitive plan. For that reason we assume that this phase of the Commission's order may have been declaratory and interlocutory in character. That portion of the order which imposed affirmative requirements on Ogden and Laclede Gas was specific and in the form contemplated by Section 11 (b). (See Holding Company Act Release No. 4307.) Whether or not such an order under 11 (b) may be deemed interlocutory in character, it is expressly made reviewable under the last sentence of Section 11 (b) which provides: "Any order made under this subsection shall be subject to judicial review as provided in section 24."

A similar point was made in the *New York Trust Company* case as to the effect of an earlier order requiring dissolution of United Light & Power Company, the proponent of the plan involved in that case. The order "having become final has thereby become the fixed point from which to survey the right they now claim", 131 F. 2d 274, 275. See also *City National Bank* v. *Securities and Exchange Commission,* 134 F. 2d 65, 68.[19]

Lownsbury v. *Securities and Exchange Commission,* 151 F. 2d 217 (C. C. A. 3), certiorari denied, No. 601, this Term, and *Okin* v. *Securities and Exchange Commission,* 145 F. 2d 206 (C. C. A. 2), relied on by petitioner, deal with a wholly unrelated problem, not affecting the judicial review which has been had in this case. Those cases merely hold that where a Section 11 (e) plan is to become effec-

[19] Petitioner urges that it was not adversely affected by the order of May 20, 1943, since the substantial reduction of Laclede Gas' debt required by that order could have been effected without retirement of the 1919 bonds, or might have been effected by retirement of the bonds with a premium. It is not necessary to determine here whether bondholders have standing to challenge an order under section 11 (b) fixing the action required of a company to comply with the statute. Cf. *Okin* v. *Securities and Exchange Commission,* 325 U. S. 385, and *Todd* v. *Securities and Exchange Commission,* 137 F. 2d 475 (C. C. A. 6). If, however, hondholders can object to such an order, it is clear that the time to do so is in connection with the entry of the order. To hold otherwise would thwart the purpose of the statute to treat such an order as final in the absence of timely review. As we have pointed out, bondholders are not foreclosed by such an order in respect to matters not covered by it.

tive only after enforcement in a district court under Section 11 (e), the orderly process of judicial review must be limited to challenging the plan in the district court and, if the challenge is rejected, by appealing from the district court's order. The holding in those cases that such an administrative order is not subject to direct review under Section 24 (a) of the Act rests in part on the fact that the last sentence of Section 11 (b), expressly referring to review under Section 24 (a), is by its terms limited to subsection (b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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